IN THE SUPREME COURT FOR THE

STATE OF FLORIDA

Case No. SC15-534

R. LEE SMITH,
and CHRISTY SMITH,

Petitioners,

vs.

CITY OF JACKSONVILLE,

Respondent.

On Review of a Certified Question
from the First District Court of Appeal
Lower Tribunal No.: 1D14-2191

INITIAL BRIEF OF THE PETITIONERS

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STATEMENT OF THE CASE AND FACTS

This appeal involves an interpretation of the Bert J. Harris, Jr., Private Property Rights Protection Act ("Bert Harris Act," or "Harris Act") Section 70.001, Florida Statutes (2010), by an *en banc* majority of the First District Court of Appeal. *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015). The Bert Harris Act was a historic enactment passed by the Florida Legislature in 1995 as a remedial measure, intended to afford relief to private property owners whose properties became unfairly affected by governmental actions, which governmental action(s) may have fallen short of a compensable "taking" under the laws of condemnation.

On May 20, 2005, Petitioners Lee Smith and his wife, Christy Smith, ("the Smiths") who lived across the St. Johns River in Jacksonville's San Marco area, 18 miles away, bought an undeveloped lot on the St. Johns River at Heckscher Drive for $575,000. (A 612)[1]. Mr. Smith's career had been as a lawyer specializing in real estate transactions. (A 627). He considered the riverfront property in question to be a fine investment. (A 629). The property offered expansive vistas up and down the river, including an unimpaired view of historic Mayport on the opposite

[1] The Appendix to the City's Initial Brief filed in the First District Court of Appeal contains the record for this Court's review of the case. Citations to said appendix will be referenced herein as (A ____). The decision is reported at 159 So. 3d 888 and designated herein as *Smith* at ____.

shore and access to deep water in close proximity to the Atlantic Ocean. (A 629, 643). The Smiths built a small dock for personal watercraft and fully intended to resell this unique property as a premium residential home site. (A 629-31). The Smiths' plan for their lot was consistent with existing uses of the two neighboring lots. The southwesterly lot had a 1.5 million dollar luxury home with dock and landscaping; the two-acre northeasterly lot, owned by Respondent, the City of Jacksonville ("the City"), was zoned residential and, since 1954, had been restricted by deed to be "used solely and only for the recreation and enjoyment of such employees of Duval County as the County Commission shall from time to time designate." (A 513, 544). Before purchasing their property in 2005, Mr. Smith reviewed the public records for zoning and other land use restrictions on their property, as well as the neighboring parcels. (A 629). All such parcels were zoned "residential low density." (A 513). The county had owned and used this northeastern parcel as a pastoral park for over 50 years. (A 544). The Smiths purchased their property, being satisfied that the actual and allowable uses of the neighboring parcels were uniformly consistent with their intent to market their property as a high-end residential site. (A 629).

Plans for a Fire Rescue and Marine Facility. In the fall of 2005, without advising the owners next door (the Smiths), and unbeknownst to the Smiths, and with the idea of using the property next to the Smiths for a new fire station-marine

launch facility, the City took action to remove the City's aforesaid longstanding recreational deed restrictions. (A 247). The City obtained the needed signatures on a quit claim deed on October 5, 2005, relieving the City from the quiet-use obligations of the deed restrictions. On June 26, 2006, again without the Smiths being aware, the Fire Chief of the City filed an application for rezoning the City's lot from RR to PBF-1 to enable it to construct the new fire department building and marine operations unit (A 1120). On February 8, 2007, the Director of the Jacksonville Fire Rescue Department caused a required written notice to be mailed to area owners advising of Notice of Meetings of the Land & Zoning Committee, a Planning Commission and the City Council, all to consider the rezoning application of the JFRD. Despite that the Smiths had owned this property of record since May of 2005, the Department sent them no written notice of its rezoning plans and hearings. (A 235).

The inevitable occurred. Without the Smiths' knowledge, in March 2007 the City Council rezoned the property from Residential Low Density-B to Public Building Facility-1 (A 1124), with the stated purpose of permitting the construction of a new marine fire Station No. 40 adjoining the Smiths' property line. In the litigation to come, the City's attorneys pled as the City's affirmative defense that Lee and Christy Smith had "unclean hands" for not participating in the public rezoning process (A 149), but in time they admitted and stipulated that

"City officials had never sent or served the Smiths with a Notice of Meeting(s) or Notice of Proposed Change of Zoning Ordinance before the zoning ordinance was changed." (A 237).

Aside from the City's *legal obligation,* by its own municipal code § 656.124, to notify in writing the adjacent property owners, the Smiths, about the proposed rezoning, absent too was notice to the Smiths of the fire department's plans to construct next door to them the outsized facility. Station No. 40 fire department official, Al Kinard, was present and spoke at the City Council meeting to ensure passage of the needed rezoning ordinance. (A 1104). He explained in court that he was "very passionate" about the new fire station No. 40 (A 831) and conceded that he never once in any manner personally contacted property owners in the vicinity of the planned station, including the adjacent property owners, the Smiths, whose property would be the one most directly affected at its northeast property line. (A 834).

Specific Actions of the Government. In October 2005, the City silently obtained for its parcel a cancellation of the deed restriction. (A 513). Then, in March 2007, the City obtained a zoning change, in violation of its own ordinances requiring notice, for purposes of constructing a fire station on the northern parcel. (A 513). A city ordinance required that "all owners of real property within 350 feet of the boundaries of the land upon which rezoning is requested" were to be

mailed notice of the proposed zoning change and the requisite public hearing at least 14 days prior to the date of the hearing. § 656.124, *Jacksonville Code of Ordinances*. The City never mailed the required notice to the Smiths, and the Smiths as a result were unaware of the proposed zoning change until after build-out of the structure was well underway. (A 632-33). The City approved and issued itself a building permit in December 2010 and immediately constructed a towering marine fire station facility on its adjacent parcel. These collective acts—the cancellation of the deed restriction, the rezoning, and the issuance of the building permit – were all necessary for the City's construction of the facility, and were all done without any notice to the Smiths. (A 632).

When Lee Smith finally discovered the new Station 40 under construction, he testified, "I was just kind of shocked and didn't know why I didn't know about it." Smith confirmed at trial, under oath, that not only had he not received formal written notice, as the immediate projected next-door owner, he also was *never* notified or contacted by anyone at any time about the emerging project. (A 633).

The Fire Station and Marine Launch Center. About the look of the newly built station next door, Lee Smith at trial testified ardently that with an 8-foot chain link fence, which was not allowed in residential zoning, and "a parking lot that's lit up at night that looks like Disney World. And it's got a long commercial dock. I mean it's just the most offensive thing I've ever seen next to a

residential lot. It's a disgusting, depressing site if you own the land next to it." (A 639). Had he known of the City's plans and ordinance changes in advance, Smith testified he would have objected strenuously to the City's action during this course of events to protect their property interests, but he never had the chance. (A 634).

The marine-launch fire station facility in fact is an outsized, industrial-type structure located on the waterfront immediately adjacent to the Smiths' property, looming over it and separated only by an eight-foot chain link fence. (A 513). The facility includes a commercial dock providing five berths for government vessels, including those of the fire department; daily emergency runs; diesel-fueled test runs; state law enforcement and port security; and an array of exterior lights, sirens, claxon wake-up horns, and outdoor loudspeakers. (A 514, 560-63). The facility, with its uniformed personnel—lounging, fishing, cooking, smoking—draped over the upper wall out on the elevated patio (A 568-570; photo A 269), to the Smiths, is a discordant neighbor and, as all appraisers concede, has severely depreciated the market value of the Smiths' property as a premium residential home site for which it was intended. (A 266, 276, 279, 310, 338, 339 514).

The Bert Harris Act. When the Smiths finally understood that the now-constructed fire station facility was not a just a plan, but a reality, they turned with hope to the Bert Harris Act. The Harris Act's passage in 1995 would afford a new remedy, independent of the existing law of takings, after lengthy discussion and

deliberation in the Florida Legislature. *See* § 70.001(1), Fla. Stat. (1995). The Harris Act provided for an extra-judicial process by which property owners could present private property claims to the perceived infringing government entity for pre-suit evaluation and resolution. *See* § 70.001(4), Fla. Stat. (1995). If a claim were still unresolved after this process, the property owner could then bring an action in the circuit court for relief under the parameters of the Harris Act. *See* § 70.001(5), Fla. Stat. (1995).

The Smiths' Bert Harris Claim. As prescribed by the statute, the Smiths presented their detailed claim in writing to the City dated November 29, 2011, accompanied by an appraisal evidencing the extreme depreciation in value of their property directly caused by the City's construction of the facility. (A 270, 636-38). The Smiths anticipated and hoped that their grievance would be studied and resolved at the pre-suit stage through the various remedies available under the Harris Act, but Jacksonville's city officials and attorneys refused to discuss the situation, or to make any written settlement offer to address or remedy the Smiths' claimed $470,000 in damages. (A 58, 148, 632).

After the Smiths filed their Harris Act administrative claim, (A 270) Jacksonville's city officials seemed oddly unmoved. The Smiths dutifully had followed the procedures prescribed by the Harris Act in attempting to bring their plight to the attention of the City, but after receiving their claim on November 29,

2011, Jacksonville's City's officials said nothing. The Smiths thought some kind of corrective actions might be proposed as the Harris Act seemed to promise would follow. Surely Jacksonville would see the problem and do business. On April 6, 2012, they sent a perfunctory Harris Act "ripeness decision," after waiting out almost the entire 6-month statutory period (A 274); and only later, after suit was filed, did the City raise an objection that the Harris Act supposedly did not cover the situation. There was no indication of concern or remediation of any kind from City officials, starting with the then mayor who received the Harris Act letter of Complaint. If the City employee assigned to review the claim had made a call to the Smiths or their counsel, they at least might have understood that the City had unfairly and illegally failed to follow the re-zoning ordinance, which required prior written notice to the Smiths. After the 180-day period of "ripeness," the fire station was completed, and then the City served its perfunctory statement of allowable uses but with no offers of settlement. They sat by and waited to be sued. If the city officials thought the Harris Act did not apply and they were not going to do anything, they could have notified the Smiths of that in the first week after receiving their claim. They waited an additional five months for the station to be complete. The Smiths could do nothing.

Bert Harris Lawsuit. Thereafter, in July 2012, the Smiths filed the Harris Act suit in the Duval County Circuit Court against the City. (A 55-59). The Smiths

alleged that the City's rezoning, issuance of a building permit, and consequent construction of the marine fire station facility "inordinately burdened" their property and that they were accordingly entitled to relief under the Harris Act. The City countered with a Motion to Dismiss, arguing that the Harris Act, as a matter of law, only provides a remedy to owners of the property against which the governmental action was intentionally or purposefully applied. (A 61-64). Stated differently, under the Harris Act, owners of parcels adversely affected by governmental action *on adjacent real estate,* the City said, were not eligible for relief. This argument was considered and rejected by three different circuit judges at various stages of the trial court proceeding: on a motion to dismiss, on a motion for summary judgment, and at trial.[2] (A 145-46, 241-42, 512-518).

A Critical Pretrial Stipulation. The City initially answered the Smiths' Complaint (A 147), asserting, inter alia, that the Plaintiffs had "unclean hands" and were barred by laches because they did not participate in the public hearings related to the zoning change. (A 149). When the City's attorneys discovered that no notice had been sent and saw that it was due to the City's own defaults that the Smiths did not appear at these public meetings, the laches defense was abandoned, and by the pretrial procedures that followed, a *jointly signed stipulation* before trial

[2] Judge Jean Johnson denied the City's motion to dismiss. Judge Virginia Norton denied the City's motion for summary judgment, and Judge Hugh Carithers found for the Smiths and against the City at the phase one trial on liability.

was executed whereby the City's attorneys and the Smiths' attorneys agreed that the trial would proceed on the premise that the Smiths had not been served with notice of such proceedings. The stipulation was worded as follows: "*The Defendant, City of Jacksonville, did not send or serve the Plaintiffs, Lee and Christy Smith, with a Notice of Meeting(s) or Notice of Proposed Change of Zoning Ordinance before the zoning ordinance was changed.*" (A 237).

The Phase One Trial. The Harris Act provides for bifurcated trials on the issues of liability, "phase one," and damages, "phase two." § 70.001(6), Fla. Stat. (2010). At the liability stage, the trial court found that the Smiths' property indeed had been inordinately burdened by the City's actions, including the City's failure to serve the required written notice of the zoning proposal, and the Smiths were entitled to a phase two trial for damages under the Harris Act. (A 512-18).

Before the First District Court of Appeal. The City appealed the non-final order on liability in March 2014 before the court-ordered phase two trial could be conducted on damages. (A 519-21). On its own motion, the First District Court of Appeal reviewed the appeal *en banc*. The parties' arguments and the opinions of the court focused on the breadth of the Harris Act's application. A nine-judge majority opinion authored by Judge Wolf reversed the trial court's order, opining

hat the Bert Harris Act only applies to property that was directly subjected, as in purposefully, to government action.[3] *Smith* at 888.

The majority opinion regarded as irrelevant Circuit Judge Hugh Carithers' finding that legally required notice of a proposed zoning change was an important fact and that notice of proposed rezoning had never been delivered to the Smiths, and that when they discovered it, it was far too late to do anything about it. In footnote 1 to its opinion, the First District commented that "these issues (lack of notice) have no relevance to appellees' ability to maintain a Harris cause of action and will not be addressed within this opinion." *Id.* at 916. The majority's footnote 2 added that such a claim of zoning-notice infraction, "if such a cause of action existed (under the Harris Act) would be untimely." *Id.*

Five of the First District judges dissented from the majority and agreed with opinions authored by Judges Swanson (*Id.* at 895) and Makar (*Id.* at 896). They viewed the Harris Act's application more broadly, consistent with the rulings of the circuit court.[4] Accordingly, The First District certified and phrased the following question to be one of great public importance:

MAY A PROPERTY OWNER MAINTAIN AN ACTION PURSUANT TO THE HARRIS ACT IF THAT OWNER HAS NOT HAD A LAW, REGULATION, OR

[3] Judges Benton, Roberts, Wetherell, Rowe, Marstiller, Ray, Osterhaus, and Bilbrey concurred with the majority opinion.

[4] Judges Padovano, Thomas, Clark, and Makar concurred with Judge Swanson's dissenting opinion. Judges Padovano, Thomas, Clark, and Swanson concurred with Judge Makar's dissenting opinion.

ORDINANCE DIRECTLY APPLIED TO THE OWNER'S PROPERTY WHICH RESTRICTS OR LIMITS THE USE OF THE PROPERTY?

As to the original version of the Bert Harris Act before its amendment and effective date in 2015, the certified question should be answered in the affirmative. The Smiths filed a notice to invoke the Court's discretionary jurisdiction, and the Court accepted jurisdiction.

The City of Jacksonville filed a "Suggestion of Mootness" of this appeal on June 10, 2015, contending that the certified question would be no longer be of public importance. On the same day, the Second District Court of Appeal issued an opinion in *FINR II, Inc. v. Hardee County,* 164 So. 3d 1260 (Fla. 2d DCA 2015), a decision contrary in both letter and spirit to the *Smith* majority opinion of the First District below. The Second District certified conflict. The Court then accepted *FINR II vs. Hardee County* for review and has denied the City's suggestion of mootness in order to review this case on its merits.

SUMMARY OF THE ARGUMENT

The Bert Harris Act, as enacted in 1995, delivered to the public a remedial statute which granted the circuit courts of Florida the duty to consider the act(s) of a governmental entity that inordinately burden private property, as a separate and distinct cause of action from the law of takings. This 1995 statute, by its plain language, did not confine the acts of government to regulatory actions limited to a specified or described property. No matter what the Florida Legislature might

have done by amendments in 2015, its remedial provisions before October 1, 2015, should still be available to compensate Petitioners Lee Smith and Christy Smith for a very real monetary loss in the value of their property. *See, e.g., City of Ft. Lauderdale v. Dhar,* 41 Fla. L. Weekly S61 (Fla. Feb. 25, 2016). All appraisers in the case agreed that devaluation of Smiths' property followed the City's acts in rezoning the City's property resulting in the erection of a fire station and launch facility on the adjacent property.

Apart from the preceding argument, the city government did the following collective acts that affected the Smiths' property: (a) quietly, without telling the Smiths, obtained a waiver of the critical long-term deed restriction on its adjacent property, (b) did not notify the Smiths by mailing to them the Code-required advance notice of the City's rezoning petition, (c) never gave actual notice of any kind to the Smiths of the fire department's plans for next door, and (d) pulled a building permit and constructed the massive fire station/launch facility. All of these acts sufficiently constituted "governmental regulatory action" directly causing an inordinate burden on private property within the meaning of the Harris Act, and the Smiths' resulting injury should be compensated in a phase two trial on remand.

ARGUMENT

Standard of Review. The Court's review is *de novo* because the issue before the Court is a question of statutory interpretation. *See Hopkins v. State*, 105 So. 3d 470, 472 (Fla. 2012); *West Florida Regional Hospital Center v. See*, 79 So. 3d 1, 8 (Fla. 2012); *Gainesville Health Care Center, Inc. v. Weston*, 857 So. 2d 278, 283 (Fla. 1st DCA 2003).

I. THE FIRST DISTRICT MISCONSTRUED THE BERT HARRIS ACT BY HOLDING RELIEF AVAILABLE TO A PRIVATE PROPERTY OWNER ONLY WHERE GOVERNMENTAL ACTION IS DIRECTLY APPLIED TO PROPERTY, THUS RESTRICTING ITS USE TO A REGULATORY CONTEXT.

In reading the Bert Harris Act, one sees initially that the Legislature in the expression of its intent did not further define the words "real property." The Smiths' lot, of course, is real property. How then does the First District's majority logically arrive at the conclusion that the term "real property" in the Harris Act only means property that the government has purposefully singled out for regulation in some manner?

The certified question raises the issue whether a Bert Harris remedy is available, as the question phrases it, where there is no "direct" application of a law, regulation, or ordinance to an owner's property which restricts or limits its use. This directness predicate comes from the language of the statute, which in section 70.001(3)(e)(1) Fla. Stat. (2010) states that the phrase "inordinate burden" means

that "an action of one or more governmental entities has *directly restricted or limited the use of real property."* Here is where the majority opinion in its articulation of the phrase "directly restricted or limited the use of," parts company with the understanding of the three circuit judges in Duval County who considered the same phrase. The three circuit judges studied the same language and concluded that "directly restricted" or "directly limited" meant that what the city government did was the immediate or proximate cause of the resulting damage to the Smiths' property. To them "directly restricted" is the language of significant causation.

The First District's majority opinion seizes the same "directly restricted" phrase and concludes that "*directly restricted or limited"* means that the government must purposefully single out for regulatory treatment an owner's property for there to be Bert Harris-type relief. In application, the District Court's majority opinion would confine all Harris Act remedies to such regulatory situations. This interpretation of the word "directly" in the Harris Act, therefore, turns out to be both the focus and the point of difference among those in the judicial debate. The two positions, relating to the same statutory language, seemingly cannot be reconciled.

In phrasing the certified question, the First District's majority incorporates a preferred interpretation of this intensely contested word "directly," which the

majority says means regulatory and not causation. The certified question from the First District proceeds to question whether a Bert Harris remedy is available where there *was no* intentional application (meaning the government did not aim at the Smiths' property) of a law, regulation, or ordinance to the owner's property which restricts or limits its use. In the Petitioners' view, the certified question is phrased with a subtle bias, which is the result of the one posing the question having assigned his (disputed) interpretation to the statutory word "directly." Nevertheless, the Petitioners willingly brief the fair underlying question whether the Bert Harris Act of 1995 was intended to limit its remedy to so-called regulatory situations, or whether its remedy was intended to extend to any situation where government has by act(s) in fact *affected* private property (inordinately burdened it) regardless of regulatory origin, which issue, under the Act, was to be negotiated by the parties or ultimately resolved by circuit court.

A. The Bert Harris Act of 1995 provided a new remedy for government actions unfairly affecting private property apart from the law of direct regulatory takings.

The time-honored practice of Florida courts has been to apply the plain and unambiguous language of statutes, as written as the Supreme Court wrote here:

> It is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation. . . . The Legislature must be understood to mean what it has plainly expressed and this excludes construction. . . . [T]he courts have only the simple and obvious duty

> to enforce the law according to its terms. . . . *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992) (internal quotation and citation omitted).
>
> In *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) this Court wrote:
>
> [W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. . . .It has also been accurately stated that courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or *limit*, its express terms . . . . To do so would be an abrogation of legislative power. (*internal quotations and citations omitted).*

It is axiomatic, therefore, that a reviewing court should simply apply the plain and ordinary meaning of the Harris Act's text if its meaning is clear enough without straining to find appropriate canons of statutory construction. We therefore, first turn to the language of the statute to determine if its unadorned provisions, standing alone, extend a Bert Harris remedy to the Smiths even though the Smiths' property is adjacent to the offending condition about which the Smiths issued a Harris Act complaint.

The Bert Harris Act provides that if the above-described actions of state governmental entities inordinately burden real property, the property owner of that real property is entitled to relief. § 70.001(2), Fla. Stat. (2010). The Harris Act defines "property owner" as the legal title holder, § 70.001(3)(f), and "real property" simply as land, § 70.001(3)(g). Notably absent from the Harris Act, as

originally worded in 1995, through and including the facts in this case, is any suggestion that property owners who are eligible for relief under the Act are limited to the owners of property intentionally regulated or purposefully referenced by the governmental action.

Examining the Harris Act, one sees immediately that the statute was drafted in the familiar manner of an all-risk insurance policy. In the all-risk policy, coverage extends to all perils except those specifically excluded by the policy. In like manner, by its structure, the Harris Act initially extends relief for *privately owned real property that is inordinately burdened*. The drafters then set forth certain specific kinds of damage (*burdens*) that would be excluded from the term "*inordinately burdened*." If one or more of these enumerated exclusions did not bar a property owner from a Bert Harris remedy, then the property would be eligible.

One might question whether the legislative drafters considered the fact situations of adjacent or nearby lands being affected by governmental actions aimed at other properties. The exclusions that appear in the statute demonstrate that indeed the drafters of the 1995 Bert Harris Act did consider potential adverse impacts to properties adjacent to properties being immediately impacted by governmental regulation. In the definitional section of the Harris Act, the drafters stated that "the terms 'inordinate burden' or 'inordinately burdened' do not include

. . . impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section." § 70.001(3)(e) Fla. Stat. (1995). This exclusion appears in the same section of the Harris Act where the drafters were inserting other appropriate exclusions relating to other discrete circumstances. If the Harris Act singles out for exclusion the adjacent property of other lots in the vicinity of a property being afforded remedial relief under the Harris Act, surely the drafters thought of the kindred situation of properties not directly regulated by government but "burdened" nevertheless by governmental regulatory action directed at other properties nearby. No exclusion of this type appears, and it would be found in the definitions section of the Act where such exclusion, if intended, logically would have been inserted. Such exclusion would have plainly stated that the terms "inordinate burden" and "inordinately burdened" do not include incidental impacts to real property caused by governmental laws, regulations, or acts taken on or against other parcels of real property. The statute's plain language is clear enough.

B. The Bert Harris Act of 1995 is a remedial statute that should be construed to effectuate its remedial purpose.

The Bert Harris Act in 1995 was drafted in general, remedial terms. "A remedial statute is one that is designed to redress an existing grievance, or introduce regulations conducive to the public good." *Capone v. Philip Morris*

United States, Inc., 116 So. 3d 363, 376 (Fla. 2013). It also may give a party a type of remedy for a wrong, where he had none or a different one before. *See Adams v. Wright*, 403 So. 2d 391, 394 (Fla. 1981); *Fonte v. AT&T wireless Services, Inc.*, 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005).

The drafters of the Harris Act could not envision every factual situation that might arise involving a governmental infringement of private property rights. Their remedial intent, however, they made crystal clear. The statute provides relief for a property owner who is forced to bear permanently a disproportionately greater share of a burden imposed for the good of the public. §70.001(3)(e), Fla. Stat. (2010). The Harris Act, as Judge Makar observes in his dissent in *Smith*, is so manifestly remedial in nature that canons of strict construction have to take a back seat. *See Irven v. Department of Health & Rehabilitative Services*, 790 So. 2d 403, 406 (Fla. 2001).

The Third District in *Royal World Metropolitan, Inc. v. City of Miami Beach*, 863 So. 2d 320 (Fla. 3d DCA 2004) considered a Harris Act claim brought by Royal World against the City claiming that newly adopted ordinances had the effect of denying Royal World all economically viable uses of its property. The City filed a motion for summary judgment, arguing that the Act did not preclude the city its sovereign immunity. The trial court granted the city a summary judgment. The Third District reversed, holding that "a fair reading of the Harris

Act evinces a sufficiently clear legislative intent to waive the government's sovereign immunity as to a private property owner whose property rights are inordinately burdened." *Id*. at 322. The court wrote that such a patently remedial statute should be construed and applied to give effect to the legislative intent regardless of whether such construction might vary from a literal interpretation of its language. *Id*. at 321.

In *Gomez Lawn Service, Inc. v. Hartford*, 98 So. 3d 212, 214 (Fla. 1st DCA 2012), the court held that a Judge of Compensation Claims (JCC) did not have the authority to dismiss and deny a workers' compensation claim on the basis that the accident and injuries were not reported to the carrier until more than 90 days after the accident, when the operative statute required that an employee give notice to the *employer* within 30 days. The JCC read into the statute and concluded that because the claimant and employer were in effect the same party, the worker was so seriously injured that he was required to report the injury to the *carrier* within 30 days, and therefore notice to the carrier more than 90 days after the fact was not reasonable and was untimely. The First District reversed and held that the plain language of the operative statute required only that the claimant report his injury to his *employer* within 30 days of its occurrence "and nothing more." *Id.* at 214. The First District opinion explained that courts should rely on the words used in the statute, giving them their plain and ordinary meaning, without involving rules of

construction or speculating as to the Legislature's intent. *Id.* It should not add words that were not included by the Legislature. The Court cited the same reasoning from *Bend v. Shamrock Services*, 59 So. 3d 153 (Fla. 1st DCA 2011) and *McArthur v. Mental Health Care, Inc*., 35 So. 3d 105 (Fla. 1st DCA 2010).

FINR II v. HARDEE COUNTY. The Second District has recently issued an opinion and decision (now before this Court) on the subject of adjacent property owners in the context of a Bert Harris claim. In *FINR II v. Hardee County*, 164 So. 3d 1260 (Fla. 2d DCA 2015), the owner of a rehabilitation facility brought a Harris Act claim against the county for granting a mining company an exception from the previously existing setback requirements to conduct mining operations on the adjacent parcel. The mining operations allegedly resulted in excessive noise, vibrations, and dust precluding the proper owner's use of the property as a rehabilitation facility. *Id.* at 1262. The trial court dismissed the *Harris* claim, but was reversed by the Second District.

The Second District's 2-1 opinion declared that the plain and unambiguous language of the Harris Act potentially provides broader relief to owners of property that are inordinately burdened by governmental action, and that a more limited application defeats the legislative intent. Specifically, the majority recognized that Harris Act claims are limited to the owners of property allegedly burdened by governmental action, but that "there is no clear expression (in the Act) of any

intent to limit relief to property owners whose property was the subject of the governmental regulatory action and deny relief to adjacent property owners." *Id.* at 1264. The court further explained that "[t]o limit the [Harris] Act to afford a cause of action only to a property owner whose property was subject to the direct action of a governmental entity would be to rewrite the statute to insert an additional requirement not placed there by the Legislature and would defeat the Legislature's stated intent. *See Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999) (explaining that courts "are not at liberty to add words to statutes that were not placed there by the [l]egislature")." *Id.* at 1264.

This legal analysis is correct, and we believe and urge that it should be applied to the facts of this case. The Second District, in examining the same statute on the same legal issue of an "adjacent" property owner, reached a completely different conclusion from the First District below. The 2-1 majority of the Second District considered the majority's opinion in *Smith*, was not persuaded by it, and refused to adhere to it, with this explanation:

> We decline to follow *Smith*. By holding that governmental action under the Act is limited to "those types of actions which would support a regulatory taking," the Smith majority construed the Act too narrowly. *Id.* at 891. Furthermore by reading into the statute the requirement that the property inordinately burdened be the subject of the governmental regulatory action, the Smith majority ignores the legislature's intent—specifically set forth in the Act—to create "a separate and distinct cause of action from the law of takings" and to thereby provide "relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state…as applied, unfairly affects

> real property" but does not "amount[ ] to a taking under the State Constitution or the United States Constitution." See § 70.001(1). It is clear from the plain language of the Act that property owners do not have to show that a taking has occurred. Thus "government action," which is defined in the Act as "a specific action of a governmental entity which affects real property," is not properly limited to actions which amount to a regulatory taking. See § 70.001(3)(d). We agree with Judge Makar's dissent that "if the Florida legislature had intended to enact a more narrow meaning of governmental action, one consistent with the City's position, they could have easily done so." Smith, at 906 (Makar, J., dissenting).

In sum, the Harris Act, as written, does offer relief to adjacent property owners who satisfy the other legal and factual preconditions for a claim. This means adjacent property owners, like the Smiths, should be eligible to file a claim for relief under the 1995 and 2010 versions of the Harris Act.

Harris Act claims are prompted by the action of a governmental entity, defined in the Act as follows:

> The term "action of a governmental entity" means a specific action of a governmental entity which affects real property, including action on an application or permit. §70.001(3)(d), Fla. Stat. (2010).

Such action broadly includes any governmental "conduct or behavior." *Black's Law Dictionary* (10th ed. 2014) (defining "action"). S*ee also Cambridge American English Dictionary* (2nd ed. 2008) (defining "action" to mean "the process of doing something, or something done"). The City has argued that the requisite action should be limited to regulatory-type actions aimed at a particular property, but its argument is not supported by Harris Act case law. In support of its contention, the

City relies on the Harris Act's references to laws, rules, regulations, and ordinances to suggest that these are the only governmental actions triggering remedies under the Harris Act. Indeed, these actions, as applied to a particular property, may constitute governmental action under the Harris Act, but nowhere does the Harris Act indicate that such are the only kinds of governmental action the Act covers. Judge Makar discussed this contention in his dissenting opinion:

> At various points and for various purposes, the Act refers to various combinations of governmental actions such as "laws, regulations, and ordinances," a "new law, rule, regulation, or ordinance," a "law or regulation," and a "rule, regulation, or ordinance," but no unified list is evident. While one might conclude that laws, regulations, ordinances, rules, and other similar actions are within the ambit of "specific actions," *nothing in the language or structure of the Act precludes any other "specific actions" that might impose an inordinate burden on private property in their application, such as a permitting action -- which is specifically included in the definition of "specific action.*" (emphasis added.) *Smith* at 905.

Two points should be made here. First, as noted in the excerpt from Judge Makar's dissenting opinion, the Harris Act explicitly provides that the requisite action may include "action on an application or permit." § 70.001(3)(d), Fla. Stat. (2010). The Smiths' claim is founded on such an action—the City's application and issuance of a construction permit, which is how the rezoning was applied to permit the erection of the complex of structures next to the Smith's property. Second, the broad references to laws, rules, regulations, and ordinances found in the Harris Act are consistent with the obvious characterizations or definitions of

governmental action and surely include the City of Jacksonville's defective rezoning and permitting actions. *See Cambridge American English Dictionary* (2nd ed. 2008) (defining "law" to mean "a rule made by a government that states how people may and may not behave in society and in business"; defining "rule" to mean "an accepted principle or instruction that states the way things are or should be done, and tells you what you are allowed or are not allowed to do"; defining "regulation" to mean "the rules or systems that are used by a person or organization to control an activity or process"; defining "ordinance" to mean "a law or rule made by a government or authority").[5]

The Harris Act requires simply that the governmental action "affect" real property. § 70.001(3)(d), Fla. Stat. (2010). The City's rezoning, issuance of a building permit, and construction of the marine fire station facility affected the Smiths' property by severely undercutting its market value, as shown by the

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[5]As noted in Judge Makar's dissenting opinion, City appears to concede that the rezoning of property and the issuance of building permits may be requisite actions under the Harris Act in certain circumstances, just not these circumstances.

> "[T]he City concedes that the issuance of the building permit and, as argued by the Smiths, the rezoning of the property may be considered 'specific actions' under the Act. The City does not argue the rezoning is irrelevant or time-barred; instead, it argues only that the rezoning was of its own property—not the Smiths'—leaving the allowable uses of the Smiths' lot unchanged. The City's argument is that the 'specific action' must also be done with the intent to apply it directly to the subject real property, here the Smiths' lot . . . ." *Smith* at 905.

required preliminary appraisal in support of the claim (a $470,000 loss). The word "affect" here illustrates its plain and ordinary meaning—to "produce an effect on [or] to influence in some way." *Black's Law Dictionary* (10th ed. 2014). Experts for both the Smiths and the City testified at the phase one trial that the City's action caused a material decrease in the market value of the Smiths' property. (A 514-15).

The City has argued that a claim under the Harris Act requires that the governmental action be intentionally or purposefully applied to a particular private property for its owner to bring a claim under the Act. The original Harris Act, by its terminology, however, addresses only the detrimental effect of a governmental action. There is no mention of the government's motivation, intent, or purpose. To limit the application of the statute to regulatory situations would cripple the remedial intent and the character of the statute, which was to provide affected property owners with a new basis for "relief." The addition of an element of government's purpose or intent would substantively change the Harris Act from the expanded cause of action that the Legislature clearly provided. This the Court should not do. In *Krause v. Textron Financial Corp.*, 59 So. 3d 1085, 1089 (Fla. 2011), this Court correctly observed: "[W]e are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.'" (internal citation omitted).

The Harris Act of 1995 was a new approach. It was intended to enable private citizens to deal with local government more immediately, more comprehensively, and with better leverage. As most observers recognized, this was a bold and historic shift of direction in the realm of existing private property rights. It was intended to apply to governmental actions that that do not rise to the level of a regulatory taking. *See* David L. Powell, et al., *A Measured Step to Protect Private Property Rights*, 23 Fla. St. U. L. Rev. 255 (1995) (A 91). In spite of that unhinging of the Harris Act statute from the law of taking, the majority opinion of the First District below has seemingly reverted to the persistent fears of government officials, that an application of the Harris Act, without being tied to the control of regulatory activity, would amount to "cataclysmic" changes and bad public policy. This statement ignores that in 1995 the Florida Legislature unmistakably wrote its purpose into the statute—that it intended to provide a *separate and distinct* cause of action from the law of takings when the governmental action's effect on property falls short of a taking. *See* § 70.001(1), Fla. Stat. (1995).

About the same time that Florida's Legislature enacted the Bert Harris Act, other states were passing similar statutes protecting private property rights. Judge Makar specifically points to Texas' Private Real Property Rights Preservation Act, enacted in 1995. *See* Ch. 95-517, Laws of Tex. (codified at § 2007.001, *et seq.*,

Tex. Gov't Code). *Smith* at 906. The Texas statute provides a different definition of "governmental action" and expressly limits a compensable remedy to owners of property "that is the subject of governmental action." § 2007.002(5)(B), Tex. Gov't Code. This is a critical distinction. The words are not complicated. It is easily done if that is the intent of the drafters. Unlike the Harris Act, which simply contains no such restriction, the plain language of the Texas Act narrowly limits the class of eligible property-owning beneficiaries.

When drafting the Harris Act, the Florida Legislature was explicit about what infringements of private property rights would or would not be eligible for relief. Under § 70.001(3)(c), the offending governmental entity covered would not and does not include the United States government of any agency of the state exercising federal authority. Under § 70.001(3)(e), inordinate burdens would not include 1) temporary impacts to real property, 2) impacts caused by government abatement, prohibition, prevention, or remediation of a pubic nuisance, or a noxious use of private property, 3) impacts to real property caused by an action of government taken to grant relief under this (Bert Harris) section; and 4) under 70.001(3)(f), does not include relief for a governmental entity.

If the 1995 Legislature had intended to exclude adjoining landowners from relief, it would have been easy for the drafters to have included in the preceding list of exclusions from Bert Harris relief "real property adjacent to property that is

the subject of governmental action." Alternatively, the drafters, in defining the term "real property" in § 70.001(3)(g), wrote: "The term real property means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner had a relevant interest." The drafters easily might have continued to say, "But the term real property as defined herein does not include lands adjacent to property that is the subject of governmental action or regulation." With the drafters being so explicit about defining the intended property eligible for relief, it is not credible that the Harris Act by inference would exclude adjacent property owners.

Reflecting on the Harris Act and also on the majority's strained attempt to declare a limitation on properties eligible for Bert Harris remediation, Judge Makar states the obvious: "[I]t bears emphasis at the outset that if the Florida Legislature had intended to enact a more narrow [application], one consistent with the City's position, they could have easily done so." *Smith* at 906 (Makar, J., dissenting). *Accord, FINR II,* 164 So. 3d at 1265 (quoting Judge Makar with approval).

In sum, the City of Jacksonville's conduct or behavior, "its action," irrefutably produced an effect on, or influenced, or in some way "*affected*" the Smiths' property. The City lifted its deed use restriction, rezoned its adjacent parcel without serving written notice to the Smiths, in advance and in writing, in contravention of its own zoning ordinance; the City then approved and issued a

building permit authorizing the construction of the marine fire station facility; and ultimately, the City constructed the facility. All of this caused an immediate decrease in the value and marketability of the Smiths' adjacent property for certain uses, namely a premium residential home site. As such, the City's actions constitute remediable action of a governmental entity within the meaning of the Harris Act.

The City of Jacksonville's actions caused an immediate reduction in *economically viable uses* of the Smiths' property and a corresponding decrease in its market value without any intervening events. The City's actions are the immediate and proximate cause of such permanent depreciation in value, preventing the Smiths from ever using or exercising their vested right to market and sell their property as a premium residential home site. The City's own appraiser, under oath, declared that the Smiths' property was depreciated by upwards of $65,000, based partially on the obvious psychological element—because "once you tell someone you're talking about a fire station next to you, all the things you and I think about a fire station come to mind." (A 776, 777, 790). Ron Moody, the Smiths' appraiser, said the Smiths' property was devalued by $470,000. (A 364). This foreseeable and entirely predictable, cause-and-effect impact (indeed the "direct" cause) on this contiguous landowners' property make hollow indeed the assertion that because the effect was on an adjacent parcel next

door to where the "action" took place, the damage was merely incidental. In sum, City's action directly affected the Smiths' property by leaving the Smiths with unreasonable use of their property, within the meaning of the Harris Act.

C. Harris Act granted authority to circuit judges to determine in phase one trial whether government acts caused an "inordinate burden" to private property.

The determination of whether an *inordinate* burden was caused by the City's acts was a key triable issue at the phase one trial. The circuit judge found that the effect of the City's acts on the Smiths' property indeed rose to the level of an inordinate burden, and the court's finding of fact is beyond the scope of the certified question at issue. By the intent of the original Bert Harris Act, the circuit judges were to be the "gatekeepers" concerning the bona fides of all the constituent facts surrounding the question whether the government created an inordinate burden or unfair effect on private property. The extent to which the government's act(s) may or may not have produced a harmful effect on a private property was intended to be the focus of the phase one bench trial.

> **§ 70.001 (6)(a)**: The circuit court shall determine whether an existing use of the real property or a vested right to a specific use of the real property existed and, if so, whether, considering the settlement offer and statement of allowable uses, the governmental entity or entities have inordinately burdened the real property. If the actions of more than one governmental entity, considering any settlement offers and statement of allowable uses, are responsible for the action that imposed the inordinate burden on the real property of the property owner, the court shall determine the percentage of

> responsibility each such governmental entity bears with respect to the inordinate burden.

The circuit judge is empowered to deny a claim at this first level, using the definitions and standards chosen by the statute. The judge can find a claim does not present "inordinate" or material damage or "unfairness" considering any settlement offer and the ripeness decision of the government, so that the claim is dead, or that the proffered remedy of the government, if any, was fair. The Harris Act requires the end result of action of the governmental entity to have "inordinately burdened" an owner's existing use or vested right to a specific use of their property. § 70.001(2), Fla. Stat. (2010). The Harris Act provides two definitions for an inordinate burden.

The terms "inordinate burden" and "inordinately burdened":

> Mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, *or* that the property owner is left with the existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. § 70.001(3)(e)(1), Fla. Stat. (2010). (emphasis added).

The facts of this case fit within either definition. At the phase one trial, however, the trial court specifically applied the second definition and made the following conclusions of fact. Said the Judge:

> There is no question here that the Smiths had a vested right to build a home on the property, or to sell the property to someone who wished to build a residence thereon. There also is no question that, after the construction of the fire station, the Smiths have been left with an inordinate burden placed on the property as to its viability for such use. In fact, the Court concludes that if the Act did not apply to the facts at bar, it would be hard to imagine facts under which it did apply. (A 517).

What the First District majority has done in the *en banc* opinion below is to alter the structure of the remediation provision of the Act. Now, instead of the circuit judge, as gatekeeper, weighing the facts surrounding the claim, including any offers of the government, the First District, by giving its preferred interpretative treatment of the word "directly," has carved out an area of *immunity* for government.

Owing to this government-prone philosophical interpretation by the First District's majority, the government probably cannot be held responsible for its inadvertent acts or unintended consequences and non-regulatory or indirect injury caused to any adjacent or nearby property. It re-opens the gap which the Bert Harris Act was intended to address. The state now can safely avoid the injurious consequences of what it does to the private property of others by a cautious disclaimer of intent.

Directness as Causation. The First District Court of Appeal's *en banc* majority opinion below, relying on the statutory phrase "directly restricted or limited the use of real property," concludes that there is a directness limitation in

the Harris Act that permits relief to properties that by express reference only are affected by governmental action. § 70.001(3) (e), Fla. Stat. (2010). This finding, in the context of this statute, interprets the word "directly" contrary to its usual meaning, with which judges and lawyers work every day, being "proximate cause." Judge Swanson, in his dissent, concisely explained that the word meant just that, immediate causation:

The statutory phrase "directly restricted or limited the use of real property" is properly construed to refer to the issue of causation and simply requires the action of a governmental entity to immediately and detrimentally affect the value of real property without the intervention of other factors. *Smith* at 896.

Judge Makar viewed it the same way in his dissenting opinion:

> Another approach is to consider whether the governmental action is direct, uninterrupted, and immediate, as in this case, such that the effects of the marine fire station are borne directly by those close-by who share a property line. This approach makes the most sense, and need not open vistas of ruinous liability. The conclusion that an adjoining property is directly affected under the Act draws a relatively clear line. Directness in this sense has a commonly understood meaning. *Id.* at 908-909.

At its core, the certified question in this case turns on the application of § 70.001(2), Fla. Stat. (2010), which sets forth the basis for remedies under the Harris Act. The intent of the legislation is succinctly stated:

> 2) When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right

> to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

The stated legislative purpose of the 1995 Bert Harris Act is contained in paragraphs one (1) and two (2) of the statute, which states that "it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property." If this 1995 enactment was considered dramatic and historic, as it was, and added, meaningfully, the words "apart from the existing law of takings" as "a separate and distinct cause of action," which it did, how can the First District's majority opinion plausibly conclude that this original legislation merely limits private property claims to the issue of measure of damages in so-called regulated applications?

It has been 20 years since the original Bert Harris Act was enacted by the Florida Legislature. The current Florida legislature and its lobbyists are in no favorable position to discern the legislative intent of the enactors of the Harris Act in 1995. As this court held in *Kaisner v. Kolb*, 543 So. 2d. 732, 738 (Fla. 1989):

> [It] would be absurd to construe the repeal of a statute, even where the Legislature purports to make the repeal or partially retroactive, as a "clarification" of original legislative intent. *Subsequent legislatures, in the guise of "clarification," cannot nullify retroactively what a prior*

> *legislature clearly intended. Art I, § 10, Fla. Const.* (emphasis supplied).

This court wrote in *State Farm Mutual Automobile Insurance Company v. Laforet*, 658 So. 2d 55, 62 (Fla. 1995):

> It would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent; the membership of the 1992 Legislature substantially differed from that of the 1982 Legislature.

This court, again, reiterated the principle that legislative amendments of a statute enacted long after the original cannot be considered a clarification. See *McKenzie Check Advance of Florida v. Betts*, 928 So. 2d 1204, 1210 (Fla. 2006) (in this case, an amendment 7 years following the original).

The First District majority's strained interpretation of the Harris Act's original, understandable language amounts to no less than judicial lawmaking. The First District's decision in this case has not cleared up an ambiguity, but rather has amended the Harris Act, precisely in the manner as did the 2015 Legislature twenty years after its enactment in 1995. The difference is that the Legislature had a constitutional right to amend such legislation.

Curiously, the First District, in its majority opinion, writes that "the stated Legislative purpose of the Harris Act viewed in the context of existing case law regarding regulatory takings at the time the Harris Act originally passed supports the Court's opinion that the Act requires a direct regulatory restriction for

maintaining a Harris action." The majority opinion explains, in its view, what the Bert Harris Act effectively accomplished:

> The focus, as reflected in the language of the Act, was on the level of damage a party had to demonstrate in order to maintain an action based on the regulatory action of government. The act changed that standard from "deprivation of all reasonable beneficial use" to "inordinate burden." *Smith* at 892.

One ponders the slight difference between a claim that the government deprived the landowner of "all reasonable beneficial use of his land" and a claim that "the government imposed an inordinate burden on his land." There might be a slender, measurable difference, but is that really what the historic Bert Harris Act was all about? The study committees, the scholarly articles, the speeches, the dire predictions about what was to happen—can that be just about the suggested subtlety of a jury instruction on the degree of allowable damages in the usual regulatory claim? The District Court opinion cautiously limited explanation falls short of the Act's turbulent history.

It is useful to compare Judge Makar's rebuttal to the idea that the circuit judge below triggered a "cataclysm" in the law. He writes that resorting to interpretive canons is unnecessary:

> A construction of the Act that allows the Smiths to pursue their claim does no disservice to the language and intent of the Act; it sets off no cataclysm. Incidental, indirect, or remote effects do not amount to an inordinate burden; only those shown to have a direct application are actionable. And in the context of this unusual case, recognizing a cause of action for the inordinate burden imposed by this

> unprecedented 24/7 marine facility built on a residential border, signals that Bert Harris remedies apply only to the most direct and burdensome governmental actions. Because the Smiths' claim is within the letter and spirit of the Act, no need exists to engage in canon analysis. *Id.* at 911.

II. THE TRIAL COURT PROPERLY FOUND THAT THE SMITHS WERE ENTITLED TO RELIEF UNDER THE BERT HARRIS ACT BECAUSE THEIR PROPERTY WAS DIRECTLY AND ADVERSELY AFFECTED BY CITY'S REGULATORY ACTION.

A. City's rezoning decision, without notice, and its subsequent construction of the fire station constituted a "governmental regulatory action" for purposes of the Act.

The majority opinion of the First District limits "proper" Bert Harris claims to government regulatory actions, but even under this analysis what the City of Jacksonville did here qualifies. The City took four distinct acts, all geared to produce a new fire rescue and marine launch station on the property next to the Smith property. It lifted an important deed restriction on its property; it failed to adhere to its notification zoning ordinance section 656.124 in order to notify an adjoining landowner in proposing and changing the zoning from rural residential to an industrial classification; it then pulled a regulatory permit to build its station; and then constructed the complex. These are regulatory acts. Surely such a rezoning affects the properties around it and of course affects the immediately adjoining property, which it did.

The majority opinion says in a pair of dismissive footnotes that the issue of the City's faulty rezoning process had no relevance to the Smiths' ability to maintain a cause of action under the Harris Act, and that any cause of action under the Bert Harris Act based on this rezoning – without notice – would be untimely. The statement is just incorrect. The City was forced to concede and stipulate on the eve of trial, as *a part of the important factual issues to present in the Smiths' case*, that the City had not served the Smiths with the required notice of proposed change of zoning and uses of its property. (A 237). As Judge Swanson in dissent so aptly observed, "It is difficult to see how appellees could have challenged a rezoning decision when they had no notice of it." *Id.* at 895.

The issue of the unfairness of the lack of notice was indeed a key feature of the Smiths' Bert Harris action against the City. Lee Smith's testimony that he had *never* been notified about the zoning or about the plans for the new station was recognized by the trial judge together with the joint stipulation that the Smiths had not been properly notified of the zoning change that had been sought. Judge Carithers pronounced it a "major factor" in his mind because the Legislature in drafting the Harris Act expressly provides for "relief, or payment of compensation, when a new . . . ordinance of the state or a political entity in the state, as applied, *unfairly affects real property*." (A 892). § 70.001(1) Fla. Stat. (1995). The Bert Harris statute opened with its pronouncement of intent:

> "The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution." § 70.001(1)

At the beginning of the trial in the court below, the circuit judge and the parties were well aware of the written stipulation between the City and the Smiths that the City had not notified the Smiths of the Meetings or Notice of Proposed Change of Zoning Ordinance before the zoning ordinance was changed. (A 237). The ensuing trial buttressed the point when Lee Smith testified that he was not notified of anything related to the plans for change of zoning and building a fire station on the adjacent property. In the findings of fact from the court order, the circuit judge found:

> Significantly, in an apparent violation of its own code, the City never sent a written notice of its proposed zoning change to the Smiths. Because of that, the Smiths were never able to participate in the rezoning process by asserting the detrimental effect the same would have on their property. In fact, the Smiths never became aware that the rezoning had occurred (in March, 2007), until construction of the fire station began thereafter." (A 513).

The circuit judge stated orally at the conclusion of the trial that this lack of notice resulting in the unawareness of the Smiths that the character of the property was dramatically changing was a major factor in his mind. (A 892). He considered that the city's violation of the law related to serving written notice of proposed rezoning changes, inadvertent or not, amounted to gross unfairness and an

inordinate burden resulting to the Smith property by its devaluation. Such was enough to constitute a Bert Harris claim and cause of action. It was not enough to sway the majority opinion of the First District.

The Federal Constitution requires serious attention to violations of "notice requirements" involving real property. In the case of *Gulf & Eastern Development Corporation v. City of Fort Lauderdale*, 354 So. 2nd 57 (Fla. 1978) this court quashed a decision of the 4th District Court of Appeal and remanded the case back to the circuit court on the basis that an affected landowner was not given prior notice and an opportunity to be heard before action was taken by the zoning authority which had the effect of altering the uses to which the owner might put his land. Wrote the court: "It is without question that due process requires that an affected landowner be given prior notice and an opportunity to be heard before action is taken by a zoning authority to alter the use to which the owner is permitted to put his land." (citations omitted).

In Delta Property Management v. Profile Investment Co., 87 So. 3d 765 (Fla. 2012), a case where a property owner did not receive a tax collector's deficient mailing of a tax sale, this Court remanded the case to try the notice issue *de novo*. The opinion explained what proper notice must be:

> . . . to satisfy due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

> objections." *Mullane vs. Centennial Hanover Bank and Trust Company*, 339 US 306, 314 . . . The Supreme Court has further explained that whether a particular method of notice is "reasonably calculated" to provide adequate notice requires "due regard for the practicalities and peculiarities of the case." (Citation omitted).

B. Smiths were left with unreasonable existing or vested uses such that they bear permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

There is no question that appellant's regulatory action of rezoning the property without notice to the Smiths and, more importantly, constructing the massive fire station on the rezoned property unfairly affected Smiths adjoining real property by decimating its value. The manner in which the City went about placing this oversized facility next to the Smith's riverfront residential property was the direct cause of the Smiths to have to bear the burden of heavy monetary loss for the benefit of the entire area. Surely this is the kind of governmentally imposed unfairness that prompted legislators to pass the Bert Harris Act in the first place. The statutory language written in 1995 reflects it. The Bert Harris Act affords relief for an inordinate burden where "*the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public.*" § 70.001(3)(e) (1), Fla. Stat. (1995).

Under Bert Harris reasoning, if government chooses to place a facility immediately next door to one's private property because the general public would be so benefited by the placement, why should the private property and its owner have to bear the entire burden of the devaluation of the owner's affected private property? The government should in fairness redress the imbalance imposed "for the good of the public." If the Smiths were left only to be able to dispose of their once $575,000 lot for $100,000 after the placement of the station, they should be able to make a claim for their very real loss.

III. THE 2015 AMENDMENT OF THE BERT HARRIS ACT ALTERS THE ACT, BUT IT SHOULD NOT AFFECT THE SMITHS' PRE-EXISTING REMEDY FOR DEVALUATION OF THEIR PROPERTY.

The City, in its previously filed suggestion of mootness, already has signaled its argument that the Legislature's 2015 amendment only *clarified* the original Harris Act. This argument is flawed and just plain wrong. The 1995 Harris Act was not unclear. The original enactment was innovative, some might call "cataclysmic," because it required government officials at the relevant level to examine a property owner's claim, through the owner's eyes, before such a claim automatically had to be filed in a court action. It was supposed to require officials, at the level where remediation might be found, to pay attention to the serious complaint of a private property owner. If the parties could not work something

out, the Act unmistakably gave Florida's circuit judges the responsibility to determine, as an issue of fact, whether there were government act(s) that unfairly affected one's private property, and that factual finding in the phase one trial had to take in all the surrounding factors, *including* the hoped-for government's pre-suit offer of remediation (if any) made in the 180-day period in which the Act contemplated the parties would be negotiating.

The 2015 amendment has radically altered the way the Harris Act was to function. In one "clarification," it eliminates all potential affected property owners other than those that the government has subjectively said it was purposefully regulating. That is the key to understanding what has happened here, both in the First District's decision below and in the 2015 amendment.

The Florida Legislature, in the 2015 regular session, amended the Harris Act to redefine "real property owner" and "real property" and to exclude adjacent property owners from sustaining claims under the Harris Act, regardless of the inordinate burden that might otherwise have been imposed by a governmental action. The amendment reads, in part:

> (f) The term "property owner" means the person who holds legal title to the real property *that is the subject of and directly impacted by the action of a governmental entity* ~~at issue~~. The term does not include a governmental entity.
>
> (g) The term "real property" means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner *has* ~~had~~ a relevant

> interest. *The term includes only parcels that are the subject of and directly impacted by the action of a governmental entity*.

Ch. 2015-142, § 1, Laws of Fla. (codified at § 70.001(3)(f)(g), Fla. Stat. (2015))(emphasis added). Under the 2015 amended version, effective October 1, 2015, having an adjacent parcel of land to the City's, the Smiths would have been out of luck; however, the statute applies prospectively only. Had the amended language of 2015 been the Legislature's original intent, the 1995 Legislature could easily have stated so in 1995.

Any suggestion that in 2015 the Legislature intended only a "clarification" of the 1995 Bert Harris Act would ignore established Florida law that the Legislature is presumed to have intended some alteration or specific change in the law when it makes substantive changes in the language of a statute. *See Florida Farm Bureau Ins. Co. v. Cox*, 943 So. 2d. 823, 829-30 (Fla. 1st DCA 2006). This case cites with approval *United States Fire Ins. Co. v. Roberts*, 541 So. 2d. 1297, 1299 (Fla. 1st DCA 1989) ("When a statute is amended . . . one may assume that the Legislature intended a meaning different from that accorded to it before the amendment."). By the passage of the amendment to the Bert Harris Act in 2015, the Legislature made sure that its amended Harris Act has a different meaning from the original. If the 2015 Florida Legislature thought that the original Bert Harris Act, as worded, afforded potential relief to adjacent properties, is it not logical that the Smiths and their lawyers likewise relied on that same original statutory

language before making their claim? The Smiths should be permitted to state their case to a jury to recover appropriate damages under the applicable 1995 version of the statute.

Judicial Restraint. Somewhere in the tangle of Bert Harris arguments of lawyers and analyses of judges, the devastating monetary loss suffered by Lee Smith and Christy Smith goes almost unnoticed. As deftly as a pickpocket, the City of Jacksonville quietly eliminated its deed restriction, without notifying the Smiths, changed its zoning, and threw up the incompatible industrial-like structure next door, which actions directly took away from the Smiths most of their $575,000 investment. The experienced circuit judge, Hugh A. Carithers, heard the case and saw the injustice so clearly. He could not resist his expressed exasperation in addressing the City's attorney:

> But the bottom line is that the code required direct notice to him [Lee Smith], and what a shame that didn't happen. We might not be here today because they could have, you know, vigorously participated in the rezoning process. It would require a huge amount of speculation on what would happen then. *But it's a little disingenuous for the City to now argue that this was -- this rezoning was okay when the adjacent property owner most affected by this action was not given the ability to participate. You know, it's not your fault. I don't know whose fault it is. Whoever did the title search at the time this rezoning was commenced, for whatever reason, didn't turn up the deed to the Smiths on the adjacent property. And there we are. But it's -- that's not going to inure to the benefit of this City in this case. It's a major factor in my mind.* (A 891-92). (emphasis supplied).

This case presents an odd set of facts—facts that are not likely to recur. However, for one to say that because the (inordinately burdened) Smiths are property owners next door to governmental action, and thus there can be no remedy, would be to write in a substantive limitation that simply does not appear in the original Bert Harris Act.

What might be cataclysmic, to the Smiths, in retrospect, is that their attorney read the Bert Harris Act and told them they had a Bert Harris remedy. Other lawyers and judges thought so too. That they may not do so is a result of the knife that the majority opinion of the First District has wielded by writing into the 1995 Harris Act a requirement for a "direct" regulatory statement aimed at the affected impaired property.

Observers close to the drafting process of the Bert Harris Act have suggested that the enactment's effect might be limited to a bearing on the way government has to do business with the public. It indeed was "intended to reform the way in which government does business with landowners." *See* David L. Powell et al., *A Measured Step to Protect Private Property Rights* 23 Fla. State U. Law Review 255 (1995) (A 91). The First District's majority opinion largely restores the *status quo ante* in the name of judicial construction. It denies having done anything legislative. On this point we differ.

Whether and to what extent a government should impair the rights of private property owners in the future will continue to be an issue for political deliberation. The Bert J. Harris, Jr., Private Property Rights Protection Act of 1995 was a populist-type philosophical change of direction, a trend nationally, in the momentum of encroaching local and state governmental regulations. (A 183) Nevertheless, what was appropriate public policy in 1995, or what may be desirable in 2015, is not an issue before the court in this case, and this court should not be diverted by such public policy considerations, which are issues for public legislation. The courts' historic function is shaped by judicial restraint. Courts at all levels must resist the temptation to bend the meaning of otherwise understandable statutory language and leave that where it belongs, in the hands of the legislature.

CONCLUSION

The Petitioners Smith are on the verge of having their retirement investment eviscerated by the opinion below. The unfairness, in the Bert Harris Act sense, was obvious to Judge Hugh Carithers, who considered the City's acts and thought he was not going to let it happen. The holding of the majority opinion below, that governmental action under the Bert Harris Act is limited to those acts that would amount to a purposeful governmental regulatory taking of another's property, is simply a wrong reading of the statute as it was enacted by the 1995 legislature. It is the 1995 version of the Act with which the parties here are dealing.

The circuit judge below called it a major factor that the City of Jacksonville violated its own code in failing to serve the Smiths with notice of proceedings to amend its ordinance. This violative act of the City, either standing alone or in combination with its secretiveness in obtaining a cancellation of the previous deed restriction, its failure to contact the immediately adjacent owners of its plans for the fire station, and the City officials' calculated delay in responding to the Harris Act claim filed by the Smiths addressed to the City, provide more than sufficient grounds for a remand of this case for assessment of the damages caused to the owners of the affected property. The Petitioners pray that the Court will reverse the decision and opinion of the First District Court of Appeal and remand this case for a phase two trial on damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210 (a)(2) and that the brief is in Times New Roman 14 point font.

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